No. 10791.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DANIEL P. WHITE, an individual doing business as GLOBE FREIGHT SERVICE,

Appellant,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANT.

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BRIEF OF APPELLANT.

I.
Official Report of Opinion Below.

The opinion of the District Court of the Southern District of California, Central Division, in this case is reported in 49 F. Supp. 797.

II.
Jurisdiction.

The instant action was commenced in the United States District Court in and for the Southern District of California, Central Division, to recover alleged freight undercharges under Section 6 (7), Part I, of the Interstate Commerce Act on various shipments made by appellant as a freight forwarder from Los Angeles, California, over

the line and system of transportation of appellee and its connecting carriers to destinations in the States of Illinois, Indiana, Ohio, Michigan and Pennsylvania; as such is an action arising under a law regulating commerce, the District Court had jurisdiction thereof. (*Jud. Code,* Sec. 24 (8), (28 U. S. C. 41 (8).) Within the period allowed by law after the entry of judgment by the District Court, the appellant made a motion for a new trial, which was denied by the District Court on the 28th day of December, 1943 [R. 10]. Within ninety days after the denial of appellant's motion for a new trial, appellant served on appellee and filed with the Clerk of the District Court a notice of appeal [R. 11]. By order of the District Court, the time within which the transcript of record should be filed in the United States Circuit Court of Appeals for the Ninth Circuit was extended to and including June 8, 1944 [R. 38], and the appeal is properly before this Court.

Jurisdiction of this Court is invoked under *Judicial Code,* Section 128 (28 U. S. C. 225).

III.

Statement of the Case.

The appellee, a common carrier by railroad of goods moving in interstate commerce, commenced this action against appellant, a freight forwarder of goods moving in interstate commerce, for the recovery of the differences between the transportation charges paid by appellant pursuant to his agreement with appellee [R. 18], and those which accrued under the tariffs published by the appellee and its connecting carriers [Exhibit "A," R. 8-12], and on file with the Interstate Commerce Commission, on numerous shipments of machinery, metal auto parts and mis-

cellaneous commodities [R. 7-8], shipped from Los Angeles, California, to Chicago, Ill., South Bend and Indianapolis, Indiana, Canton and Cleveland, Ohio, Detroit, Mich., and Essington, Pa. [R. 3], during the period from August, 1939, to February, 1941 [R. 15-16].

Appellant during all of the period involved and since April, 1937, has conducted a freight forwarding business. He was engaged in the undertaking of collecting at his terminal at Los Angeles parcels of freight from various shippers throughout the State of California and consolidating same into carload lots and then shipping said quantities to his other terminals where they were distributed locally in smaller lots; he engaged the services of appellee and connecting carriers to perform the scheduled transportation between the terminal centers. He maintains terminals at Los Angeles, California; Chicago, Illinois; Cincinnati and Cleveland, Ohio; Detroit, Michigan; Milwaukee, Wisconsin; and New York, New York. Through solicitation and advertising he held out to the public a complete service of transportation of small shipments of various commodities of accepted freight for transportation from store door to store door, issuing bills of lading in his name and assuming responsibility for the safe delivery of the goods. For this service he collected freight charges from each of his customers in sufficient amount to cover all of the transportation services rendered, including the charges which he in turn paid to appellee and other common carriers actually transporting the goods.

In each of the causes of action involved appellee, as the common carrier, collected from appellant, as a shipper, the freight charges which would accrue under rates published in the carrier's applicable tariffs for shipments actually

made in two 40-foot cars but which were supplied, at carrier's convenience, in lieu of one 50-foot car ordered by the shipper for the accommodation of each such shipment. All of said shipments moved under uniform straight bills of lading [R. 7 and Exhibit "C"]. On each such bill of lading appeared the notation "One 50-foot car ordered; 2 smaller cars furnished by R.R." [R. 7 and Exhibit "C"]. And the appellee on each of the freight waybills prepared by it covering said shipments made the following notation "One fifty-foot car ordered, two smaller cars furnished account carrier's convenience." [R. 5-6, Exhibit "A," page 2, and Exhibit "B," page 2]. However, prior to the making of the shipments involved, it was agreed and understood by and between appellant and appellee that appellant preferred the use of two 40-foot cars instead of one 50-foot car and that appellee would furnish appellant two 40-foot cars in lieu of a 50-foot car and assess the charges on the assumption that a 50-foot car had been ordered and two 40-foot cars furnished at carrier's convenience [R. 8, 17-18, 27, 28, 29]; and the appellee furnished the two 40-foot cars to appellant pursuant to this arrangement [R. 28]. The purpose of the appellant and appellee in having such understanding and arrangement was to enable the appellant to use two 40-foot cars in shipping his goods at the same rates and charges as were contemporaneously applicable to a like shipment made in a single 50-foot car, instead of at the higher charges applicable to a shipment made in two 40-foot cars [R. 29].

This action is predicated upon the theory, and the trial court has in effect concluded, that the arrangement by the appellant and appellee to have the use of two 40-foot cars

at the same rate which would be applicable for one 50-foot car was not a *bona fide* substitution of two for one, made for the convenience of the carrier, but on the contrary was an unlawful agreement between the carrier and the shipper to charge and collect a lower rate than was contemplated and required by the applicable provisions of appellee's published tariff. The difference between the amount contracted for and actually paid by the shipper and the amount which the trial court determined to be due under the applicable tariff rates represents an undercharge in the sum of $19,685.58, for payment of which judgment was given by the trial court.

IV.

Points Relied Upon.

1. Section 419, Part IV, of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 13, Sec. 1019), bars recovery by rail carriers subject to Part I of the Interstate Comerce Act (U. S. Code, Title 49, Chapter 1) of undercharges growing out of the transportation of freight forwarder shipments prior to May 16, 1942.

2. Section 419 of Part IV of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 13, Sec. 1019) grants immunity to freight forwarders from alleged undercharges claimed by rail carriers subject to Part I of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 1) for transportation performed by said rail carriers of freight forwarder shipments for freight forwarders prior to May 16, 1942.

3. Section 419, Part IV, of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 13, Sec. 1019) bars the appellee from recovery of the alleged undercharges.

V.
ARGUMENT.

Summary of Argument.

Point A. The cause of action herein is predicated upon special statutory authority, to-wit, Section 6 (7), Part I of the Interstate Commerce Act (49 U. S. Code, Section 6 (7)), which in substance and effect prohibits special contractual arrangements between the carriers and shippers resulting in the payment of rates different from those contained in the carriers' tariffs.

Point B. A right of action based upon statute may be abolished by the Legislature even though such right has accrued; and voluntary transactions between parties which were invalid or illegal by reason of statutory provisions may be validated by the Legislature through later enactments.

Point C. Congress by enacting Section 419 of Part IV of the Interstate Commerce Act (effective May 16, 1942), abolished the right of action, which appellee had prior to such enactment, to collect the undercharges here involved; and in substance and effect, validated the voluntary agreement and arrangement between appellant and appellee for the collection of transportation charges at rates different from those provided in appellee's published tariffs.

Point A.

The cause of action herein is predicated upon special statutory authority, to-wit, Section 6 (7), Part I of the Interstate Commerce Act (49 U. S. Code, Section 6 (7)), which in substance and effect prohibits special contractual arrangements between the carriers and shippers resulting

in the payment of rates different from those contained in the carriers' tariffs.

Section 6 (7) of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 1, Section 6 (7)) regulating rail carriers engaged in interstate commerce, at all times during the transportation of the instant shipments provided as follows:

> "Sec. 6 (7). No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privilege or facility in the transportation of passengers or property, except such as are specified in such tariffs."

Prior to the enactment of the Interstate Commerce Act, carriers were free to make such rates on interstate transportation as they saw fit, subject only to the power of the courts under the common law, at the suit of individuals, to prevent irreparable damage or give redress for unreasonable or unjust discriminatory rates. (*Texas P. R. Co. v. Abilene Cotton Oil Co.,* 204 U. S. 426, 51 L. Ed.

553, 27 Sup. Ct. 350.) In the absence of statutory enactment, such as the Interstate Commerce Act, carriers were not required to charge and collect for their transportation service in strict accordance with published tariffs. Within the broad limits recognized under the common law that rates should not be unreasonable, a common carrier, such as appellee, could lawfully enter into the type of arrangement which it had with appellant in this case for supplying two 40-foot cars in lieu of and at the same rates as those charged for a single 50-foot car.

Appellant in collecting small shipments of goods, consolidating them and reshipping them in bulk, using only the transportation facilities of others, including appellee, was a shipper. (*Lehigh Valley R. R. Co. v. United States,* 243 U. S. 444, 37 S. Ct. 434, 61 L. Ed. 839; *Great Northern Ry. v. O'Connor,* 232 U. S. 508, 34 S. Ct. 380, 58 L. Ed. 703.) Regardless of the relation that may have existed between appellant as freight forwarder and his own customers, he was not a common carrier, but a shipper, in his relations with the rail carriers whose facilities he employed. (*Acme Fast Freight, Inc., et al. v. United States, et al.,* 30 F. Supp. 968, affirmed in 309 U. S. 638, 60 S. Ct. 810.) Being merely a shipper in his dealings with appellee, it is clear that under the provisions of Section 6 (7) of the Interstate Commerce Act, above quoted, the only freight charges lawfully applicable to the transportation service performed by appellee were those determined by the rates as contained in appellee's published tariffs. Appellee's suit is therefore predicated upon the statutory requirement imposed by Section 6 (7) of the Interstate Commerce Act above quoted, under which appellee seeks to collect $19,685.58 as undercharges represent-

ing the difference between the transportation charges originally collected and those which accrued under the published tariff rate.

Point B.

A right of action based upon statute may be abolished by the Legislature even though such right has accrued; and voluntary transactions between parties which were invalid or illegal by reason of statutory provisions may be validated by the Legislature through later enactments.

If a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them and if final relief has not been obtained before the repeal becomes effective, it cannot be granted thereafter, and the repeal deprives the Court of jurisdiction of the subject matter. (*National Carloading Corp. v. Phoenix-El Paso Express, Inc.* (Texas Supreme Court), 176 S. W. (2d) 564; Certiorari denied by United States Supreme Court, 64 S. Ct. 1156.)

Rights of action based on purely statutory grounds may be abolished by Congress even after they have accrued. (*Ewell v. Daggs,* 108 U. S. 143, 2 S. C. 408, 27 L. Ed. 682; *Hazzard v. Alexander,* 36 Del. 212, 173 Atl. 517; *Wilson v. Head,* 184 Mass. 515, 69 N. E. 317; *National Carloading Corp. v. Phoenix-El Paso Express, Inc.* (Texas), 176 S. W. (2d) 564.)

The authority of Congress to validate voluntary transactions between parties which at the time they were entered into were by statute invalid or illegal has been upheld by the United States Supreme Court. (*West Side R. R. v. Pittsburg Construction Co.,* 219 U. S. 92, 31 S. C. 196, 55 L. Ed. 107; *McNair v. Knott,* 302 U. S.

369, 372, 58 S. C. 245, 82 L. Ed. 307; and in *National Carloading Corp. v. Phoenix-El Paso Express, Inc.* (Texas), 176 S. W. (2d) 564.)

The appellee did not possess such a vested right as to come within the inhibition of the Fifth Amendment to the Constitution of the United States. Such a right must be something more than a mere expectation based upon an anticipated continuance of the existing law. If before rights become vested in particular individuals, the convenience of the state induces amendment or repeal of the laws upon which they are based, these individuals are left without any remedy at law to enforce their claims. If final relief has not been granted before the repeal goes into effect, it cannot be granted thereafter. When the law is amended or repealed without a saving clause, it is considered, except as to transactions passed and closed, as though it had never existed. (*National Carloading Corp. v. Phoenix-El Paso Express, Inc.* (Texas), 176 S. W. (2d) 564.)

Point C.

Congress, by enacting Section 419 of Part IV of the Interstate Commerce Act (effective May 16, 1942), abolished the right of action, which appellee had prior to such enactment, to collect the undercharges here involved; and in substance and effect, validated the voluntary agreement and arrangement between appellant and appellee for the collection of transportation charges at rates different from those provided in appellee's published tariffs.

Part IV of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 13, Sections 1001 to 1022, inclusive) deals extensively with the operations of freight forward-

ers and regulates their activities in general, including their duties, powers, permits, rates, charges, accounts, records, reports, liabilities and practices. By its enactment May 16, 1942, freight forwarders as a class were brought under regulation by the Interstate Commerce Commission. Prior thereto they had not been recognized by the Commission or courts as carriers theretofore made subject to the jurisdiction of the Interstate Commerce Commission. In this connection it will be noted that the Interstate Commerce Act in its present form comprises four parts. Part I deals with rail carriers and was originally enacted February 4, 1887 (U. S. Code, Title 49, Chapter 1). Part II, enacted August 9, 1935, relates to motor carriers and is generally known as Motor Carrier Act 1935 (U. S. Code, Title 49, Chapter 8). Part III, enacted September 18, 1940, deals with the regulation of water carriers (U. S. Code, Title 49, Chapter 12). Part IV, enacted May 16, 1942, relates to freight forwarders.

Section 419 of Part IV of the Act limits and restricts the liability of the freight forwarders for past acts and omissions. Appellant interposes such section as a complete defense to this action and relies thereon for the reversal of the judgment rendered by the lower court. This section reads as follows:

> "No person shall be subject to any punishment or liability under the provisions of this chapter and chapters 1, 8 and 12 of this title on account of any act done or omitted to be done, prior to the effective date of this chapter, in connection with the establish-

ment, charging, collection, receipt, or payment of rates of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to this chapter and chapters 1, 8 and 12 of this title."

It is to be noted that the foregoing section provides in effect, that no person (including a freight forwarder) shall be subject to any liability under the provisions of Parts I, II, III and IV of the Interstate Commerce Act (U. S. Code, Title 49, Chapters 1, 8, 12, 13) on account of any act done or omitted to be done prior to May 16, 1942, in connection with the establishment or payment of rates of freight forwarders. The provisions of this section are clearly made retroactive. The immunity granted extends to liability for "any act done or omitted to be done, *prior to the effective date of this chapter,* in connection with the establishment, charging, collection, receipt, or payment of rates of freight forwarders." (Emphasis supplied.) No more explicit language could have been used to indicate the legislative intent that the provision should have a retroactive effect. *National Carloading Corp. v. Phoenix-El Paso Express, Inc.* (Texas), 176 S. W. (2d) 564.

The question here presented is whether under proper construction of the foregoing statutory language appellant as a freight forwarder was granted immunity from liability on account of the alleged undercharges here involved. An affirmative answer to this question depends upon the construction and meaning of the phrase "or payment of rates of freight forwarders" as used therein. Appellant respectfully contends that this language as used by Congress refers to rates accorded the freight forwarder by rail carriers subject to Part I of the Interstate

Commerce Act and therefore includes the subject matter of this action. This contention is supported by the fact that prior to the enactment of Section 419, Part IV, of the Interstate Commerce Act, containing the immunity clause, there were no "rates of freight forwarders" filed with the Interstate Commerce Commission and subject to its regulation under Part I of the Act, except such rates as were filed by rail carriers subject to Part I of the Act and made effective as to shipments of freight forwarders and of all other shippers. Such lawfully filed and published rates were as much the "rates of" the shipper as they were "rates of" the carrier. In this sense the only rates of freight forwarders of which the law took cognizance and over which the Interstate Commerce Commission exercised any regulatory authority whatever under Part I of the Interstate Commerce Act were those rates which had been set up from time to time by the rail carriers for the transportation of shipments of freight forwarders.

It is a fundamental rule of statutory construction that every word and phrase must, if possible, be given a meaning consistent with the general language and tenor of the enactment and as between its possible construction, that which gives meaning to all parts of the enactment must be preferred over one which renders any part meaningless. In the enactment of Section 419, Congress definitely included under the immunity thereby granted, liability for rates payable under Part I. This liability is further specified as the liability for rates of "freight forwarders." The only rates of "freight forwarders" recognized under Part I are, as above stated, the rates of rail carriers (and of freight forwarders) applicable to ship-

ments of freight forwarders over the lines of rail carriers. Therefore, unless the language is so construed that the phrase "rates of freight forwarders" refers to and means these rates applicable to the shipments of freight forwarders over the lines of rail carriers subject to Part I, the phrase would become meaningless and of no force whatever.

This view is strengthened by the report of the Committee on Interstate and Foreign Commerce as shown by House Report No. 1172, 77th Congress, 1st Session. On page 18 of such report, with reference to Section 419 regarding liability for past acts and omissions we find, among other things, this language:

> "This section relieves freight forwarders, common carriers by motor vehicles, and other persons from penalties and liabilities under the Interstate Commerce Act or any other Federal statute on account of anything done or omitted to be done prior to the enactment of Part IV in connection with the establishment, charging, collection, receipt or payment of rates of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to Part II.
>
> "Common law and contractual rights, remedies and liabilities are not affected by this provision.
>
> "The validity of this section, in so far as it relieves persons of liability to fines, penalties and forfeitures running to the United States is beyond doubt, and in so far as it relieves persons of liability to individuals, good authority exists for such action.
>
> "The courts are generally agreed that rights of action based upon purely statutory grounds may be abolished by the legislature even after they have ac-

crued. (16 G. J. S. Constitutional Law, Sec. 254; *Ewell v. Daggs,* 108 U. S. 143 (1883); *Hazzard v. Alexander,* 36 Del. 212, 173 Atl. 517 (1934); *Wilson v. Head,* 184 Mass. 515, 69 N. E. 317 (1904); cf. *Carson v. Gore-Meenan,* 229 Fed. 765, 767 (1916). The courts have been particularly uniform in reaching this conclusion where the right of action is in the nature of a claim by an individual for the recovery of a statutory fine, penalty or forfeiture (*Ewell v. Daggs,* 108 U. S. 143 (1883); *Lemon v. Los Angeles Terminal Co.,* 38 C. A. (2) 659, 109 P. (2) 387 (1940); *Anderson v. Byrnes,* 122 Calif. 272, 54 P. 821 (1898); *Denver & R. G. Ry. Co. v. Crawford,* 11 Col. 598, 19 P. 673, 674 (1888). The authority of Congress or a state legislature to validate voluntary transactions between parties which at the time they were entered into were by statute invalid or illegal has been upheld by the United States Supreme Court in several cases (*West Side R. R. v. Pittsburg Construction Co.,* 219 U. S. 92 (1910); *McNair v. Knott,* 302 U. S. 369, 372 (1937)."

The word "liability" as employed in Section 419, applies to civil as well as criminal liability. (*National Carloading Corporation v. Phoenix-El Paso Express, Inc.* (Texas), 178 S. W. (2d) 133, 137-138.)

Conclusion.

Appellant respectfully submits that the Court should reverse the decision of the District Court and that judgment should be granted in favor of the appellant and against the appellee.

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